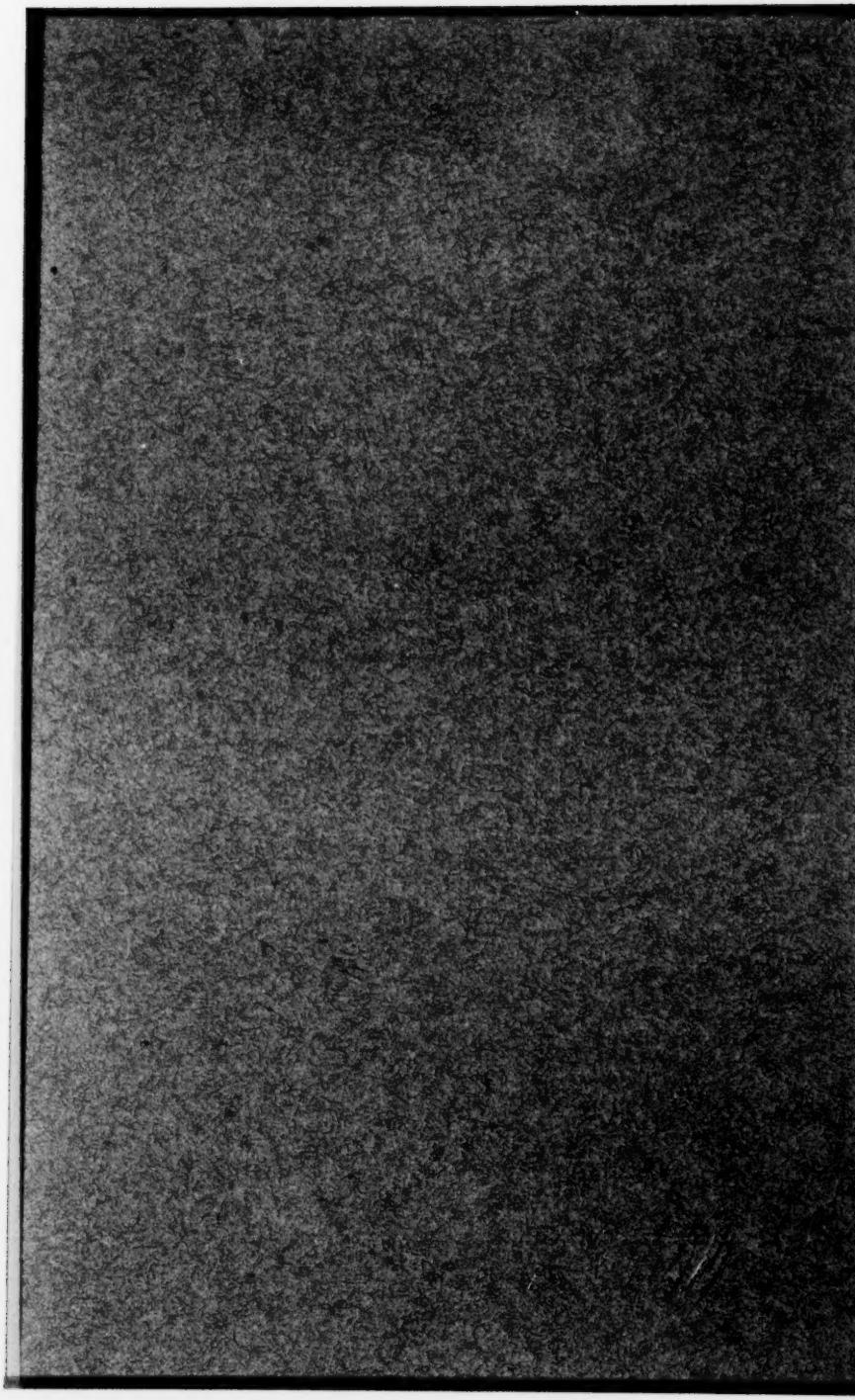

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 780

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NEW HAVEN AND SHORE LINE RAILWAY COMPANY, INC.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Comes now the Solicitor General, on behalf of the petitioner, and respectfully prays for a reconsideration by the Court of its order of February 9, 1942, denying certiorari herein.

The disposition of this case is inconsistent with *Helvering* v. *Southwest Consolidated Corp.*, No. 286, decided February 2, 1942.

This case involves a transaction in which a bondholders committee, pursuant to plan, bought in the corporate assets at equity foreclosure sale, and transferred them to a new corporation, the taxpayer. Stockholders were eliminated. The as-

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senting bondholders received stock of the new company in exchange for their bonds. Nonassentors received their pro rata share of the foreclosure price in cash. The question is the basis of the assets for computing depreciation in the hands of the new company. The court below held that there was a "reorganization" under Clause B of Section 112 (g) (1) of the Revenue Act of 1934, c. 277, 48 Stat. 680, and that therefore the basis of the assets was the same as in the hands of the old corporation under Section 113 (a) (7).

The relevant provisions of Clause B define a reorganization to mean "the acquisition by one corporation in exchange *solely* for all or a part of its voting stock * * * of substantially all the properties of another corporation." Although the Government did not specifically direct the attention of the court below to the fact, found by the Board of Tax Appeals, that non-depositors received "their pro rata share of the purchase price in cash from funds in the hands of the bondholders' committee" (R. 16; see also Pet. for Certiorari, p. 3), the fact nevertheless remains that the exchange was not "solely" for stock.

When the same problem was before this Court in *Helvering* v. *Southwest Consolidated Corp.*, we pointed out that Clause B was inapplicable for one reason, because cash had thus been paid (Br. 21–22). The Court's opinion makes it plain that such a payment, arising out of the reorganization, precludes

the application of this provision. Accordingly, under the authority of that determination, the result below is believed to be erroneous.

It is respectfully submitted, therefore, that the order denying the petition for certiorari be vacated and the petition be granted.

CHARLES FAHY,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1942.

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CHARLES ELMORE

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Brief in Opposition to Petition for Rehearing on Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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Contrary to petitioner's contention the disposition by this Court of the instant case by denial of the Writ for Certiorari is entirely consistent with its opinion in the *Southwest Consolidated Corporation* case. Here the facts, as found by the Board of Tax Appeals, come literally within the definition of reorganization in Section 112(g)(1)(B) of the Revenue Act of 1934.

The record here may have shown as stated by the Board that "the dissenting bondholders were paid their pro rata share of the purchase price in cash from funds in the hands

of the bondholders' committee" (R. 16), but that fact of itself nullifies the petitioner's contention. Unlike the fact in the *Southwest Consolidated* case which prompted this Court's conclusion that something besides voting stock was issued by the acquiring corporation, no indebtedness of the bondholders' committee was assumed by the acquiring corporation in the instant case.

Here the acquiring corporation issued "solely voting stock" in exchange for the assets. There is no finding of fact or anything in the record to the contrary. The fact that the dissenting bondholders may have received pro-rata payments from funds in the hands of the committee, before the transfer to the taxpayer corporation, as to which transaction the taxpayer had no part and assumed no obligation, does not take this case out of the literal compliance with definition B of section 112(g)(1) of the 1934 Act. The fact remains that the taxpayer acquired substantially all the property of another corporation "in exchange *solely* for all or a part of its voting stock". Nothing but common voting shares was exchanged.

There is no merit to the petitioner's contention; the instant case clearly illustrates a statutory reorganization within the meaning of the new limitation on that term in the Revenue Act of 1934 as construed in this Court's recent pronouncement.

The petition for rehearing should be denied.

Respectfully submitted,

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